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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 134

REPUBLIC NATURAL GAS COMPANY, a corporation,
Appellant,

vs.

STATE OF OKLAHOMA, CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and PEERLESS OIL & GAS COMPANY, a corporation, *Appellees.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

A.

OPINIONS BELOW

(a) The opinion of the Oklahoma Supreme Court has not been officially reported. It is reported unofficially in 180 P. (2d) 1009, and appears at page 453 of the record.

(b) The Oklahoma Corporation Commission's opinion is unreported, but appears at page 409 of the record.

B.

JURISDICTION

This appeal is from a final judgment of the highest court of the State of Oklahoma upholding as valid an Oklahoma statute, and an order of the Oklahoma Corporation Commission purportedly issued pursuant thereto, which statute and order were assertedly repugnant to the Constitution of the United States. Jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. C. A. §344a).

For a complete demonstration of this Court's appellate jurisdiction of the case at bar, see printed *Statement as to Jurisdiction,* and printed *Brief of Appellant in Opposition to Motion to Dismiss Appeal.*

C.

STATEMENT OF THE CASE

The Oklahoma Supreme Court's judgment is predicated entirely upon "undisputed evidence" (R. 458, line 30), the enormity of the instant record being necessitated simply to demonstrate the absence of any pertinent evidence except that summarized in the court's opinion. Throughout we shall refer to appellant Republic Natural Gas Company as "Republic", and to Peerless Oil and Gas Company, appellee, as "Peerless".

Republic is a Delaware corporation (R. 6, 17-18, 373), authorized, since 1937 (R. 456, line 17) or 1938 (R. 424), to transact business in Oklahoma (R. 6, 18). Despite the broad provisions of its charter (R. 373, 408a), Republic's actual business has been confined to

drilling and producing its own gas wells, and constructing, owning, and operating a pipe line gathering system by means of which it delivers and sells its own gas production; Republic has drilled a number of producing gas wells in the Oklahoma portion of the Hugoton Gas Field (R. 455-456, 457), and has constructed and operated "a pipe line gathering system of large size" (R. 456, lines 5-6), the main line of which extends some 25 or 30 miles (R. 457) from Oklahoma to Kansas (R. 456, 457).

Most of the production from Republic's Oklahoma wells is transported through Republic's pipe line gathering system to Kansas where it is sold, under contract (Ex. 15, R. 305-373, introduced at R. 167), to Northern Natural Gas Company (R. 423, 425), a common purchaser and common carrier of natural gas (R. 456, 457). The balance of Republic's Oklahoma production is gathered and sold in Oklahoma to Cities Service Gas Company (Ex. 50, R. 297-302, introduced at R. 175), another common purchaser and carrier of natural gas (R. 456, 457). There is no connection or affiliation, through stock ownership or otherwise, between Republic and the two pipe line outlets purchasing its gas (R. 456).

A complete, accurate description of Republic's operations is contained in the opinion of the Oklahoma Supreme Court:

> "Republic drilled its first wells in Texas County, Oklahoma, in 1937, and has since that time been continuously engaged in the drilling of additional wells and in extending and enlarging its pipe line system to take care of the production from such wells. *It has at no time held itself out as, or purported to be, a common purchaser or common car-*

rier of gas, nor has it transported gas from any wells other than its own[1] . . ." (R. 456; emphasis ours)

In this connection, although on one occasion Republic applied for and was granted permission by the Board of County Commissioners of Texas County, Oklahoma, to lay part of its pipe line gathering system in a county highway (R. 200-203), there is no evidence Republic possesses or has ever exercised or attempted to exercise powers of eminent domain (see R. 183).

On 28 April 1944, Peerless completed a commercial gas well in Section 14, Texas County, Oklahoma (R. 456). Under Corporation Commission regulations, only one well may be drilled upon each section of Oklahoma land (R. 456). The Peerless well is nearly surrounded by other wells owned and produced by Republic (R. 456). Since the Peerless and Republic wells are drilled into the same common source of supply (R. 457), operation of the Republic wells is draining gas from under the dormant Peerless well (R. 456). However, the Commission has fixed and allocated the amount of gas which may be produced from the Hugoton Gas Field to supply the market demand therefor (R. 455), and Republic has not taken "from its producing gas wells any gas in excess of its determined allowable, as fixed by the Corporation Commission" (R. 457).

---

1. ". . . except that under request of the Petroleum Administrator for War, it carried in its pipe lines, free of charge, gas from certain producing wells which the Petroleum Administrator required it to transport as a prerequisite to permitting it to drill additional wells of its own. It also transports gas *of its royalty owners* under its leases, which require it to pay as royalty 1/8 of the proceeds of the sale of gas" (R. 456; the statement "of its royalty owners", italicized by us, is a fallacious *legal* conclusion, as will hereinafter be demonstrated).

Peerless has no market for the gas from its well (R. 8, par. 11), nor any pipe line by which it could transport and deliver such gas to any market it might secure. However, one line of Republic's private gathering system crosses Section 14 a short distance from the Peerless well (R. 457). Upon the assumption that Laws 1913, Chapter 198 (52 Okla. Stats. Ann. §§231-235) and Laws 1915, Chapter 197 (52 Okla. Stats. Ann. §§236-247) — particularly Laws 1913, Chapter 198, §3 (52 Okla. Stats. Ann. §233) — compelled Republic to purchase and "take" Peerless' gas at its request, Peerless served written demand upon Republic to accept into its pipe line gathering system and pay for gas to be produced from the Peerless well (R. 10, 11). When Republic refused to accede to such demand, Peerless, on 1 August 1944, filed a formal application with the Oklahoma Corporation Commission praying that an order be entered (R. 9):

> " . . . requiring Republic Natural Gas Company . . . to connect its pipe line to the well drilled and owned by Peerless Oil and Gas Company aforesaid, at some point designated by this Commission, and to produce natural gas from its said wells ratably with said well of Peerless Oil and Gas Company, and to take and purchase natural gas from said Peerless Oil and Gas Company's well at a price to be fixed by this Commission."

While the aforesaid statutes had been enacted prior to Republic's authorization to do business in Oklahoma, they had never, previous to the case at bar, been construed by the Oklahoma Supreme Court or applied by the Oklahoma Corporation Commission (see R. 414, lines 17-18; R. 459, lines 28-30). Nor, in this connection, is there any evidence that Republic "accepted

and agreed to comply with the laws of the State of Oklahoma" (R. 424, lines 22-24), save as acceptance of the privilege of operating in Oklahoma may imply submission to valid Oklahoma law (see R. 462, lines 32-35; R. 219-220).

Denying Republic's assertion that the noted statutes, if construed as justifying such an order as Peerless requested, were repugnant to the Fourteenth Amendment to the United States Constitution (R. 34-35), the Commission held the statutes authorized it to require Republic to purchase and transport gas from the Peerless well, in order to assure "ratable taking" and protect the private "correlative rights" of Peerless, even if Republic were not a common purchaser or common carrier (R. 425, Finding 22; also, R. 412, lines 34-36; R. 414, lines 21-26; R. 416, lines 31-33). Accordingly, it issued the order prayed for (R. 427-428).

Upon appeal, the Oklahoma Supreme Court affirmed the Commission order, holding that although Republic was neither a common purchaser nor a common carrier of gas (R. 456, lines 20-23) nevertheless the order was authorized by Laws 1913, Chapter 198 (R. 458, lines 18-32).

Whereupon, deeming its federal constitutional rights impaired, Republic perfected the instant appeal to this Court (R. 473).

In an appendix to this brief we have quoted and summarized the applicable Oklahoma statutes.

D.

SPECIFICATION OF ASSIGNED ERRORS HEREIN URGED

Appellant intends to and does rely upon each of the eleven errors assigned by it (R. 474-477), and hereby incorporates by reference its statement of points to be relied upon (R. 479-483). Those errors pose the following two legal issues, the statement of which will serve as a summary of appellant's argument herein:

1. Republic owns and produces gas wells in Oklahoma. It owns and operates a pipe line gathering system whereby it collects gas from its wells and delivers and sells it under contract to two unaffiliated gas purchasers. Republic is neither a common purchaser nor a common carrier, and transports no gas in its pipe line gathering system except its own gas from its own wells. The *amount* of gas Republic produces from its wells is not excessive, wasteful, or violative of any statute or commission order. But because Republic's wells produce from the same gas reservoir into which the Peerless well is drilled, the *source* of part of Republic's production is gas migrating from beneath the Peerless well. Peerless has no market for its gas nor any pipe line facilities for carrying its gas to any market.

Under such circumstances, are a state statute, and a commission order purportedly issued pursuant thereto, which require Republic to purchase gas from the Peerless well and transport such gas in Republic's private gathering system to Republic's private market, repugnant to the due process and equal protection of laws clauses of the United States Constitution's Fourteenth Amendment?

It is Republic's contention that a private corporation which purchases no gas from anyone may not be compelled to purchase gas from another private corporation; that the owner of a private gathering system may not by legislative fiat be converted into a common carrier; and that merely because Republic, in *producing* its wells, drains gas from under the well of Peerless, Republic may not constitutionally be compelled to buy gas from Peerless, carry that gas in Republic's private gathering system, and deliver such gas to Republic's private market, thereby sharing with Peerless its private market and its private facilities for reaching that market. (*Assignments of error,* I, II, III, IV, XI, R. 474-477; *statement of points to be relied upon,* I, II, III, IV, VIII(a), R. 479-482.)

2. Republic is a Delaware corporation. The aforementioned Oklahoma statute, upon which the Commission order is predicated, was enacted prior to Republic's authorization to do business in Oklahoma. But, previous to the case at bar, such statute had never been construed or applied; and Republic has never consented to be bound thereby.

Under such circumstances, may Republic be compelled, under the doctrines of waiver and estoppel, to submit to enforcement by the Commission order of the unconstitutional statute? (*Statement of points to be relied upon,* VIII(b), R. 483.)

It is Republic's contention:

(a) That mere acceptance by a foreign corporation of the privilege of transacting business in a state does not constitute a waiver of its right to object, or estop it from objecting, to enforcement of unconstitutional statutes antedating its entry into the state. (*Assignments*

of error, V, VI, IX, R. 475-476; *statement of points to be relied upon,* V, VIII(b), R. 480, 483).

(b) That a state may not lawfully impose upon a foreign corporation, as a condition of granting it the privilege of doing business, a requirement that the corporation surrender the protection of the Federal Constitution and waive the right to resist enforcement of unconstitutional state statutes; and that such a waiver, even if exacted, would itself be unconstitutional, void, and unenforceable. (*Assignments of error,* VII, VIII, R. 476; *statement of points to be relied upon,* VI, VIII(b), R. 481, 483.)

(c) That no such waiver could, in any event, estop the foreign corporation from resisting a subsequent unconstitutional interpretation and application of a statute which had not been construed or applied in such unconstitutional manner prior to the corporation's entry into the state. (*Assignment of errors,* X, R. 477; *statement of points to be relied upon,* VII, VIII(b), R. 482-483.)

E.

ARGUMENT AND AUTHORITIES

I.

The Statutes and the Commission Order Are, as Applied to Republic, Unconstitutional.

We have, here, no question of statutory construction. The Oklahoma Supreme Court has interpreted the state statutes as justifying the Commission order now under attack, and the sole issue here is whether those statutes

and the Commission order, upon whatever statutory phraseology it purports to rest, are constitutional as applied to Republic. In short, our problem is not whether the order is authorized by Oklahoma statute, but, instead, is whether the order and statutes are authorized by the United States Constitution. By the same token, no studied attention to the particular statutory provisions is necessary.

Preliminarily, also, it should be noted ours is a pure question of law unfettered by controverted factual considerations. The Oklahoma Supreme Court sustained the Commission entirely upon the basis of "undisputed evidence" (R. 458, line 30) which established that Republic:

> ". . . has at no time held itself out as, or purported to be, a common purchaser or common carrier of gas, nor has it transported gas from any wells other than its own . . ." (R. 456)

The Commission's arbitrary findings to the contrary (R. 425, findings 20, 21) are wholly without evidentiary support.

Republic's charter provisions, although stressed by the Commission (R. 423, finding 18), are immaterial.[1] As Mr. Justice Stone wrote for this Court in *United States v. California*, 297 U. S. 175, 181, 80 L. ed. 567, 571 (1936):

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1. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 253-254, 60 L. ed. 984, 986 (1916); *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 304, 63 L. ed. 613, 616 (1919); 43 Am. Jur., "Public Utilities and Services", §5, p. 574, and annotations therein cited.

"Whether a transportation agency is a common carrier depends not upon its corporate charter or declared purposes, but upon what it does."

Neither is it correct to state that Republic:

> " . . . transports gas *of its royalty owners* under its leases, which require it to pay as royalty 1/8 of the proceeds of the sale of gas" (R. 456; italics ours).

As the above-quoted statement acknowledges, Republic's leases require it to pay to its lessors, as royalty, "one-eighth of the proceeds from the sale of the gas" (R. 178-179; for exact wording, see R. 28, par. i). Title to gas produced from leased premises depends upon the specific wording of the particular lease;[2] but when the lease provides for royalty payment not in kind,[3] but in money at a stated percentage of sales proceeds, title to all gas produced vests *instanter* in the lessee.[4] By the same token, Republic neither purchased gas from nor transported gas for its royalty owners.

For the latter proposition, see *United States v. Stanolind Crude Oil Purchasing Co.*, 113 F. (2d) 194, 198-199 (C. C. A. 10, 1940):

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2. *American Oil & Refining Co. v. Cornish*, 173 Okla. 470, 49 P. (2d) 81, 82 (1935); *Replogle v. Indian Territory Illuminating Oil Co.*, 193 Okla. 361, 143 P. (2d) 1002, 1007 (1943).

3. As, for example, the standard oil royalty clause in Form 88B producers oil and gas leases: " . . . the said lessee covenants and agrees: 1st. To deliver to the credit of the lessor, free of cost, in the pipe line to which lessee may connect his wells, the equal one-eighth (1/8) part of all oil produced and saved from the leased premises".

4. *Replogle v. Indian Territory Illuminating Oil Co., supra*, ft'n. 2, 143 P. (2d) at 1007-1008; *United States v. Stanolind Crude Oil Purchasing Co.*, 113 F. (2d) 194, 198 (C. C. A. 10, 1940).

"Because of the vagrant and fugitive nature of oil and gas, the owner of the land has no absolute right or title to the oil or gas which may permeate the strata underlying the surface of his land. He only has a qualified interest therein, namely, the exclusive right to erect structures on the surface of his land, to explore for oil and gas by drilling wells through the underlying strata, and to take therefrom and reduce to possession oil or gas found therein, and thus acquire absolute title thereto as personal property. But neither the landowner nor his lessee obtains title to the oil and gas until he reduces it to possession.

" . . . We are concerned here only with leases which provide for the payment, as royalty, of a stipulated percentage of the gross proceeds derived from the sale of oil. *It is well settled that in the latter type of lease, the lessor does not acquire title to any part of the oil which the lessee produces and reduces to his possession.*

"It follows that the oil sold under the leases here involved was the oil of the lessees . . ." (Italics ours)

And, as is held in *Replogle v. Indian Territory Illuminating Oil Co., supra,* 193 Okla. 361, 143 P. (2d) at 1007-1008, there is not even a "purchase" of gas from, much less a "transportation" of gas for, the lessor under leases such as the instant ones:

" . . . the transaction whereby the lessees paid for the gas could not properly be called a purchase for the use of the word 'purchase' connotes the transfer of ownership from a seller to a buyer."

Again, it is of no moment that:

" . . . under request of the Petroleum Administrator for War, it [Republic] carried in its pipe lines, free of charge, gas from certain producing

wells which the Petroleum Administrator required it to transport as a prerequisite to permitting it to drill additional wells of its own" (R. 456).[5]

To constitute one a common carrier there must be a holding out to the public generally.[6] This fundamental principle is asserted, and footnoted by a plethora of supporting authority, in 9 Am. Jur., "Carriers", §4, p. 430:

> " . . . a common carrier may be defined, very generally, as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally . . . The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently and hence he is regarded, in some respects, as a public servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession or holding out, by words or by course of conduct, as to the service offered or performed."

In the case at bar, the three temporary and special contracts entered into by Republic with Pioneer Petroleum Company, Benedum-Trees Oil Company, and Cities Service Gas Company, were not ones of carriage "for compensation". Instead, transportation was performed "free of charge" (R. 456, line 25), with Re-

5. See R. 173-4, 184-193, 203-204; exhibit 50 (R. 297, introduced at R. 175), and exhibits at R. 224-296a (introduced generally at R. 221) for detailed evidence pertaining to these special transactions with three producers.

6. 1 Bouvier's *Law Dictionary* (1914), p. 553; 1 Hutchinson, *Carriers* (3rd ed.), par. 47; 9 Am. Jur., "Carriers", §5, p. 432; 13 C. J. S., "Carriers", §3, p. 26; see *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570, 576, 69 L. ed. 445, 449 (1925).

public making the connections at its own expense and absorbing the line losses (R. 184, 187-188).

Moreover, special contracts of carriage with selected producers, even if for hire, would not constitute Republic a "common" carrier.[7] As is said in 9 Am. Jur., "Carriers", §5, p. 432:

> " . . . in view of the requirement that the holding out must be to serve the public generally, one performing transportation service for a particular customer at prices fixed in each case by a specific contract, for a particular group or class of persons under a special contractual arrangement, or for a particular person only is not a common carrier. Neither is one a common carrier who carries for himself only . . ."

Finally, there is no evidence Republic ever attempted to or in fact exercised powers of eminent domain (see R. 183). The mere fact, not deemed by the Oklahoma Supreme Court of sufficient moment to warrant mention in its opinion, that on one occasion Republic obtained permission to lay pipes in a county road (R. 200; exhibits 19 and 20, R. 200-203, introduced at R. 200) is inconsequential. As was pertinently observed by the Utah Supreme Court in *Garkane Power Co. v. Public Service Commission,* 98 Utah 466, 100 P. (2d) 571, 574 (1940):

> "That it runs its lines along public roads under permission of the county or town is no indication that Garkane is a public utility any more than the

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7. *Michigan Public Utilities Comm. v. Duke, supra,* ft'n. 6, 266 U. S. 570; *Frost v. Railroad Commission,* 271 U. S. 583, 70 L. ed. 1101 (1926); *Smith v. Cahoon,* 283 U. S. 553, 75 L. ed. 1264 (1931); see *Washington ex rel. Stimpson Lumber Co. v. Kykendall,* 275 U. S. 206, 210-211, 72 L. ed. 241, 244 (1927); 13 C. J. S., "Carriers", §11, p. 41.

> permissive building on the public right-of-way of a platform for the collection of milk indicates that a dairy farmer is a public utility."

Nor, in any event, did the Oklahoma Supreme Court bottom its judgment, even alternatively or in part, upon the ground that Republic was a common carrier or common purchaser of gas. Instead, it held the Commission order valid, duly authorized by Oklahoma statutes, even though Republic was neither a common purchaser nor a common carrier (R. 458, lines 25-32; R. 461, lines, 19-26).

At the outset it is important, also, to bear in mind the rationale of the Commission order and Oklahoma Supreme Court judgment. The order was not issued or upheld to prevent "waste", there being no evidence whatever of waste — surface, underground, economic or otherwise. There is neither evidence nor contention, for example, that Republic's wells were being produced excessively or too rapidly so as to threaten Peerless' well with "coning" whereby water beneath the gas sands inundates the area of reduced pressure near the well base, repressing the lateral inflow of gas and drowning the well. There is no suggestion that the market to which Republic sold its gas was inimical to public welfare (and, in fact, the Commission order seeks to compel Republic to deliver Peerless gas to that very market). There is no evidence that Republic withdrew from the ground more gas than was justifiable. On the contrary, the Oklahoma Supreme Court conceded:

> "It also appears that Republic does not take from its producing gas wells any gas in excess of its determined allowable, as fixed by the Corporation Commission" (R. 457).

The instant order was not designed to prevent Republic's producing, gathering and selling the same amount of gas from the same source of supply which it had theretofore been producing, gathering and selling, but solely to enable Peerless to share Republic's market. That is to say, not the *quantum* of gas produced by Republic, but the *source* thereof, prompted the Commission's order designed entirely to protect Peerless' private "correlative rights" by preventing drainage of gas from beneath its well by Republic's production:

> " . . . obviously the present order, made after notice and a full hearing, was for the purpose of correcting an inequality in the taking of gas from said field whereby the correlative rights of Peerless were being infringed" (R. 463-464).

Actually, we submit the order does not even stem from the fact that Republic's were the wells causing the drainage. Had Republic, owning no gathering system, been delivering its gas at its well heads to an unaffiliated pipe line company under special contract of carriage, the same order would have issued — but would have been directed against the owner of the pipe line rather than Republic. Conversely, if all Republic's wells were owned and produced by a nonaffiliated corporation and if Republic merely transported the production from those wells to the market under private contract with the well owner, nevertheless the instant order would have been made. Hence, it is not Republic's status as a *producer* of gas, but the fortuitous fact that it is also a *gatherer* of the gas it produces, which subjected it to the Commission's asserted jurisdiction. By the same token, the order is not premised upon "wrongful" pro-

duction by Republic,[8] but upon the fact that the Peerless well is being drained, *regardless of by whom,* and that Republic possesses a market for gas, and owns an adjacent pipe line gathering system which, if compelled to accept, carry, and market gas from the Peerless well, will alleviate the drainage effects.

At all events, there was no conceivable *public* interest to be served by the instant Commission order. Republic, a private producer and gatherer of its own gas from its own wells, is commanded to purchase gas from Peerless, another private producer, and to carry the Peerless gas to Republic's own private market in its own private gathering system, thereby surrendering to Peerless a portion of Republic's private market and private facilities for reaching that market, such order being issued *solely* to safeguard the assumed *private* rights of Peerless. Note, too, that Peerless possesses neither any pipe line facilities of its own, *nor any market to which it might dispose of its gas even if it owned such facilities;* and the Commission's dog-in-the-manger order not only requires Republic to transport Peerless gas, but also that Republic *purchase* such gas from Peerless. Even an admitted common carrier may not be compelled to *buy* the commodities it is willing only to transport.

Why is that not an unwarranted taking of the private property of one person and awarding it, not even for public purpose, to another? Why is that not a depriva-

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8. Aside from the fact that Republic's production does not exceed the allowable amount assigned to its wells by the Commission (R. 457, lines 18-21), it is obvious Republic's are not the only wells causing the Peerless drainage. Many other wells producing from the same gas reservoir are also contributing thereto. And even if Republic's wells were completely shut in, those other wells would continue drawing gas from beneath the Peerless well (R. 101, lines 28-36; R. 121, lines 20-28).

tion of Republic's private property without due process of law and a denial to Republic of the equal protection of laws in violation of the Fourteenth Amendment to the Constitution of the United States?

Appellees (see their typewritten motion to dismiss this appeal) and the Oklahoma Supreme Court seek to defend the instant order as an exercise of the state's power to protect "correlative rights" by compelling "ratable taking" of gas. It would appear to be a fair statement of their position that any order which tends to promote "ratable taking to protect correlative rights" is necessarily valid.

With this we are unable to agree. We readily concede the state's power to require ratable taking to enforce correlative rights — by a proper order in a proper case. This power, however, is but ancillary to the fundamental right of the state to preserve its natural resources, and may, we submit, be exercised only when and to the extent that its application is needed to further state conservation measures.

Thus, in addition to its basic power to proscribe waste, the state may, in the interests of conservation, restrict the total amount of gas which may be produced within its borders. As a manifestly equitable adjunct to such a measure, the state may allocate such total allowable production among individual wells by some reasonable formula. As an example, see Laws 1915, Ch. 197, §4 (52 Okla. Stats. Ann. §239, p. 503, appendix, *infra*) which permits each well to produce only in the proportion which its natural flow bears to the total natural flow of all wells drilled into the common reservoir; and see *C. J. Julian Oil & Royalties Co. v. Capshaw*, 145 Okla. 237; 292 Pac. 841 (1930), upholding such an order by the Oklahoma

Corporation Commission. Such ratable taking measures, though, are not undertaken merely to protect private correlative rights, but because the state has, in the first instance, entrammeled total allowable production in order to conserve its resources, and must, as a necessary consequence, decree ratable taking so as fairly to distribute among individual well owners the burden of the basic limitation upon production. Such an order is ancillary to the basic proration measure, and issues because of the state's interest in attaining equitable apportionment of the productive restrictions it imposes.

In the case at bar, however, the Commission order does not serve to alleviate the effects of any basic conservation measure or to assure equitable apportionment of its burdens. Peerless' inability to produce its well is not due to any state imposed constraint, but entirely because Peerless has no market for its gas and no pipe line facilities for reaching such market as it might obtain. Even if there were no Oklahoma statutes or Commission orders limiting natural gas production, the Peerless predicament would be in no respect altered — save that Republic would then be producing more gas, and, hence, the drainage would be increased. In fine, "ratable taking" is ordered in the case at bar not to attain equitable distribution as between Peerless and Republic of the burdens of any state conservation measure, nor to further any possible interest of the state in preserving its natural resources, but solely to promote the private interests of Peerless.

This, we submit, is improper. Power to limit the quantum and rate of withdrawal, to protect correlative rights by requiring ratable taking, and to issue any of the sundry proration orders imposing restrictions upon the rights of individuals to the free and unfettered use of

their private property, emanates exclusively from the state's fundamental right to conserve its natural resources. It cannot exist independently of the state's concern with those resources. All proration orders, whether ordaining "ratable taking" or otherwise, are *conservation* measures, sustainable only when they pertain to conservation of natural gas. It necessarily follows that the Commission's power to promulgate orders in furtherance of state concern with conservation of its natural resources does not embrace *independent* authority to compel one private individual to purchase or transport the gas of another private individual solely to protect the latter's supposed personal rights. The Commission might as well have sought to compel the owner of one oil well to loan or rent his spare pumping jack to an adjoining well owner whose own jack had broken, who could not find or afford another, and whose inactive well was therefore suffering drainage.

Certainly the Oklahoma Supreme Court and present appellees have adduced no decision by any court upholding the right of a state to compel a private producer and gatherer of his own gas from his own wells, who neither purchases gas from nor transports gas for any other person, to purchase and carry gas from the well of another.

The Oklahoma Supreme Court asserts the instant order enforces ratable taking "in accordance with the principles announced in *Ohio Oil Co. v. Indiana*" (R. 459).[9]

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9. 177 U. S. 190, 44 L. ed. 729 (1900). This case involved no issue pertaining to ratable taking, but merely upheld a state commission order, made pursuant to Indiana statutes, prohibiting the unrestrained flow of gas from a well into the open air, and commanding the well owner to confine its gas "in tanks, pipes, or other proper receptacles" (177 U. S. at 197) — an unarguably proper recognition of the state's power to prevent sheer waste of its valuable natural resources.

This same opinion is cited by appellees, in the last paragraph of their typewritten motion to dismiss, for the proposition that in order to prevent waste and protect correlative rights a state commission may shut in a gas well. This power, where waste exists, we concede. Even a natural person may be "shut in" by the state for violating its lawful criminal codes. But in the case at bar there was no waste, the Commission's order being issued exclusively on behalf of the private "correlative rights of Peerless" (R. 464, lines 2-3). The cited decision constitutes no precedent whatever for the judgment in the case at bar.

Champlin Refining Company v. United States, 329 U. S. 29, 91 L. ed. (Adv. Sheet) 9 (1946), upon which appellees and the Oklahoma Supreme Court (R. 461) rely, does not support their contentions, but expressly leaves open the issue raised by the judgment at bar. That opinion, interpreting Section 19(a) of the Interstate Commerce Act and involving the interstate commerce powers of Congress, merely held a private pipe line company might be compelled by the Interstate Commerce Commission to furnish *information*. In its opinion this Court was careful to emphasize it did not intend thereby to uphold the Commission's power to impose common carrier-like obligations upon the appellant:

> "Appellant further contends that, as so construed, the Act exceeds the commerce power of Congress and violates the Fifth Amendment because it is argued that this interpretation converts a private pipe line into a public utility and requires a private carrier to become a common carrier. But our conclusion rests on no such basis and affords no such implication. The power of Congress to regulate interstate commerce is not dependent on the technical common

carrier status but is quite as extensive over a private carrier. [It does not follow that a state is imbued with comparable jurisdiction over persons engaged in intrastate commerce.] *This power has yet been invoked only to the extent of requiring Champlin to furnish certain information* as to facilities being used in interstate marketing of its product. The commerce power is adequate to support *this* requirement whether appellant be considered a private carrier or a common carrier.

"The contention that the statute as so construed violates the due process clause by imposing upon a private carrier the obligations of a conventional common carrier for hire is too premature and hypothetical to warrant consideration on this record. *The appellant in its entire period of operation has never been asked to carry the products of another and may never be.* So far, the Commission has made no order which changes the appellant's obligations to any other company or person. If it does, it will be timely to consider the concrete requirements and their specific effects on appellant. At present, appellant is asked only to provide information about a subject within the power possessed by Congress and delegated to the Commission, and that cannot be considered a taking of property even if it arouses appellant's premonitions." (91 L. ed., Adv. Sheet, p. 12; our italics)

Subject to precisely this same distinction *Valvoline Oil Company v. United States,* 308 U. S. 141, 81 L. ed. 151 (1939), where the same type of "informational" order was reviewed. In addition, the appellant there was not solely a transporter of its own oil, its factual situation being similar to that of the 5 unsuccessful appellants in *The Pipe Line Cases,* 234 U. S. 548, 58 L. ed. 1459 (1914), rather than to that of the *Uncle Sam Oil Company:*

> ". . . that company's [Uncle Sam Oil Company's] pipe line was used for the 'sole purpose of conducting oil from its own wells to its own refinery.' This was held not to be transportation under the Act. Here, however, it is the purchase from many sources and subsequent carriage that determines the applicability of the statute to Valvoline." (308 U. S. at 146)

As for *The Pipe Line Cases* themselves, they did not sustain the imposition upon private carriers of an obligation to transport for other persons without the carriers' consent, but held, only that Congress in the exercise of its interstate commerce powers could "require those who are common carriers in substance to become so in form" (234 U. S. at 561); the only *private* carrier there involved, The Uncle Sam Oil Company, was exempted by this Court from subjection to the statute there under consideration.

The four decisions immediately hereinbefore discussed constitute all of the authorities relied upon by instant appellees and the Oklahoma Supreme Court as justifying the present Commission order. Yet not one is of precedential value here. Nor has our research disclosed any decision by any court which even tends to support the judgment at bar. On the other hand, we submit that *Texoma Natural Gas Co. v. Railroad Commission*, 59 F. (2d) 750 (W. D. Texas, 3 Judge Court, 1932), *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. ed. 510 (1937), and *The Uncle Sam Oil Company* decision, *supra*, 234 U. S. 548, sustain our contention that the Oklahoma statutes and Commission order may not constitutionally be applied to this appellant.

It is an indubitable rule that, as is said in 3 Honnold, *Supreme Court Law* (1933), p. 1974:

> "A private carrier cannot be converted into a common carrier by mere legislative command."

Illustrative of this fundamental principle are countless court decisions, including many by this Court.[10] For example, see *Producers Transportation Co. v. Railroad Comm.*, 251 U. S. 228, 230, 64 L. ed. 239, 242 (1920):

> "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clauses of the 14th Amendment."

Squarely in point here, we submit, is *Texoma Natural Gas Co. v. Railroad Commission of Texas, supra*, 59 F. (2d) 750, the facts of which are indistinguishably parallel to those of the case at bar. That was an action to enjoin the Texas Railroad Commission from enforcing sections 8a and 8aa of the Texas Common Purchaser Act, which sections are fully analogous to sections 2 and 3 of Chapter 198 of the Oklahoma Session Laws of 1913 (59 F. 2d at 751). Plaintiffs there were nonresident corporations authorized to do business in Texas.

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10. *Michigan Public Utilities Comm. v. Duke*, 266 U. S. 570, 577-578, 69 L. ed. 445, 450, 36 A. L. R. 1105 (1925); *Frost v. Railroad Commission*, 271 U. S. 583, 592, 70 L. ed. 1101, 1104, 47 A. L. R. 457 (1926); *Washington ex rel. Stimpson Lumber Co. v. Kykendall*, 275 U. S. 207, 210-211, 72 L. ed. 241, 244 (1927); *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264 (1931). In general, see 9 Am. Jur., "Carriers", §29, p. 445.

They owned and produced gas wells in Texas, gathered their own gas from their own wells in their own gathering systems, and transported that gas to points outside the state of Texas where they sold it under contract to various purchasers (59 F. 2d at 751). They were not purchasers of gas, and their lines were not used to transport gas for others (59 F. 2d at 751). In addition, the three judge court found as follows:

> "We further find that there are embraced within the particular gas field from which plaintiffs are supplying their demands many owners of lands and leasehold interests who are at present without market outlet; that, should the plaintiff [sic] continue to drill their own territory according to declared intent, eventually their own and *the contiguous territories of others will be drained of gas.*" (59 F. 2d at 752; our italics)

In holding the statute unconstitutional, and enjoining enforcement of a proposed commission order fully comparable to the one now under attack, the court said:

> "From these facts we conclude that the plaintiffs are private pipe line carriers who have not devoted their property to the public use for hire or compensation . . . The act is all-embracing, and includes both common and private carriers of gas by pipe line. The carrier's private status is changed to that of public by the declaration of the act alone. The Legislature is without power to do this. It is taking private property for public use without just compensation, inconsistent with the due process of law clauses of the Fourteenth Amendment to the Constitution. (Citations)" (59 F. 2d at 753)
>
> "While the act purports to conserve oil and gas as natural resources of the state, defendants concede that plaintiffs' operations do not result in waste . . .

"The act requires pipe-line carriers of gas to assume the obligations not only of common carriers but those of common purchasers. It presumes that only the interstate pipe lines in this field have market outlets; that others therein are without capital, and cannot reach distant markets; that, unless plaintiffs are forced by law to purchase gas from others in the same field and compelled to extend lines to producing wells to take the gas purchased from others, *the gas appertaining to their areas will ultimately be drained by plaintiffs' wells.*

"Or, as admitted by defendants, the purpose of the act is to compel pipe line producers to share their markets with producers in the same field who are without market, by requiring them to purchase. *The equitable principle of correlative rights or ratable taking of gas from a common pool is sought to be applied through compulsory purchase.* The act requires a private carrier engaged in interstate commerce to assume the responsibilities of a common carrier and those of a common purchaser. This invades the field of federal cognizance, interferes with and burdens the commerce between the states, contrary to article 1, §8, of the Federal Constitution. (Citations)" (59 F. 2d at 753, our italics)[11]

"We are of opinion that the mentioned sections of the act and rules of the Commission which refer to gas generally, and specifically to the West Panhandle gas field, are void and unenforceable against the plaintiffs, as in conflict with the Federal and state Constitutions . . .

"The plaintiffs are entitled to their injunctive relief as prayed." (59 F. 2d at 754)

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11. This identical assertion was voiced by Republic in the case at bar (see R. 463, first full par. by Okla. Sup. Ct.).

The only factual difference between the Texoma case and the one at bar is that there plaintiffs were using the maximum capacities of their lines in making contractual deliveries to their markets, whereas here the Oklahoma Supreme Court found Republic's market requirements were not utilizing the full capacity of its gathering system (R. 457, lines 14-16).[12] But the constitutional principle would be the same even were Republic's private gathering system capable of handling twice its present load. Moreover, and in any event, the market which Republic is ordered to share with Peerless is not sufficient even to enable Republic to dispose of all its allowable production from its own wells (see R. 167, R. 442).

The *Texoma* decision merited this Court's approval in *Thompson v. Consolidated Gas Utilities Corp., supra,* 300 U. S. 55, the following excerpts from the opinion of Mr. Justice Brandeis in the latter case being illustrative of its instant pertinency:

> "And as to the order, the plaintiffs assert that, while restrictive in form, it is in fact coercive; that its purpose and effect are not to prevent waste of gas in the common reservoir nor to prorate the opportunities of production as distinguished from marketing; that the limitation of the production of the wells is merely a device to compel the individual plaintiffs, and other pipe line owners, to purchase gas for which they have no need; that the real purpose and effect of the order are to prorate not production, but distant markets and the facili-

12. *Quaere* upon what evidence this recital is premised. Compare R. 181, lines 40-42, and R. 183, 213. In fact, Republic has been forced to expend $100,000 augmenting its gathering system in order to render it capable of handling Republic's contractual delivery requirements (R. 183).

ties for serving them; and that, thus, the order takes their property without warrant in law." (300 U. S. at 67-68)

"The defendants contend, apparently, that House Bill 266 should be construed as authorizing the Commission to reduce the production of the plaintiffs and of other pipe line owners, even if the sole purpose of doing so is to furnish a market for the sweet gas of those wells now without pipe line connections [300 U. S. at 73] . . . we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution . . ." (300 U. S. at 75)

"Every well owner in the field is free to produce the gas, provided he does not do so wastefully. He is legally and, so far as appears, physically free to provide himself with a market and with transportation and marketing facilities. There is no basis for a claim that his right, or opportunity, will be interfered with by a disproportionate taking by any one of those who may legally produce.

"' . . . the purpose of the Commission underlying the orders was, upon a theory of protecting correlative rights, to coerce complainant and other (others) similarly situated to buy gas from, and thus to share their private marketing contracts and commitments and the use of their pipe lines and other facilities for transmitting their gas to market with, the owners of wells not now connected to pipe lines, who have not contributed in money, services, negotiations, skill, forethought or otherwise to the development of such markets and the construction of such pipe lines and other facilities. In short to compel complainants to afford markets to those having none." (300 U. S. at 77-78)

"The use of the pipe line owner's wells and reserves is curtailed solely for the benefit of other

private well owners. The pipe line owner, a private person, is in effect, ordered to pay money to another private well owner for the purchase of oil which there is no wish to buy . . . Plaintiffs' pipe lines are private property. So far as appears, they are constructed on private lands. There is no suggestion that any of them is a common carrier of gas. The purpose of the owners in constructing the pipe lines was for the transport of gas only from their own leases, and such has been their consistent policy . . .

"The purpose of this order is the same as that which the Legislature sought to achieve by the 'Common Purchaser Act,' of August 12, 1931, held unconstitutional in *Texoma Natural Gas Co. v. Railroad Commission* (D. C.) 59 F. (2d) 750 . . . There is a difference in the means employed; but the difference is not of legal significance. The 1931 Act attempted to compel the purchase by frankly commanding it, under sanctions criminal and civil. The 1935 Act operates by indirection . . .

"Our law reports present no more glaring instance of the taking of one man's property and giving it to another." (300 U. S. at 78-79)

Let it be frankly conceded there is one noticeable distinction between the facts hereof and those of the *Thompson* case. There, through a geological anomaly created by antecedent production, gas migration as a whole was from the wells connected to pipe lines and towards the unconnected wells (300 U. S. at 72). And the opinion contains generalized *dicta* (for example, 300 U. S. at 76-77) which suggest, or, rather, "assume" (300 U. S. at 76) a different result might follow were unconnected wells being drained by those producing into pipe lines. However, we submit this distinction is, from a constitutional standpoint, of no significance. We have,

we believe, already demonstrated herein that the state has no proper concern with private drainage as such, save as a subsidiary problem appertaining to equitable allocation among well owners of the burden of some basic conservation measure. Where, as in the case at bar, such drainage as occurs is causing no injury whatever to the state or to its natural resources, and Peerless' subjection thereto is in no part attributable to any state conservation statute or commission order restricting the quantum or rate of gas withdrawals, the migration of gas from beneath the Peerless well does not call into operation the exercise of state jurisdiction (as delegated to the Corporation Commission) to invade Republic's private rights in the interests of gas conservation, nor, by the same token, does it justify a Commission order requiring Republic to purchase and transport Peerless gas. Now that the issue is squarely before this Court for decision, we submit the rule announced by the three judge court in the *Texoma* case should be adopted.

It is submitted the Commission order enjoining Republic, a private producer and a private gatherer of its own gas from its own wells in its own pipeline gathering system, to purchase and transport Peerless gas, is an infringement of Republic's constitutional rights, and that the Oklahoma Supreme Court judgment sustaining such order should be reversed.

II.

Republic, a Foreign Corporation, is Not Estopped to Assert Unconstitutionality of the Oklahoma Statutes and Commission Order Applying Them, Merely Because the Statutes Antedated Republic's Authorization to Transact Business in Oklahoma.

The Oklahoma Supreme Court held, alternatively, that even if the statutes were, under the *Texoma* and *Thompson* decisions, unconstitutional as applied to Republic by the Commission's order, nevertheless Republic was precluded from so contending by having accepted the privilege of doing business in Oklahoma at a time when the statutes were in purported force and effect (R. 462), citing in support of its holding *Pierce Oil Corporation v. Phoenix Refining Co.*, 259 U. S. 125, 66 L. ed. 855 (1920), affirming 79 Okla. 36, 190 Pac. 857 (1920). We submit this ruling is erroneous, and that Republic may not be denied its constitutional rights by an improper application of the doctrines of waiver or estoppel by the Oklahoma Supreme Court.

(a). Mere Acceptance by a Foreign Corporation of the Privilege of Doing Business in a State Does Not Entail Submission to Existing State Statutes Which Are Unconstitutional.

There is, as we shall more fully demonstrate hereinafter, no evidence in this record that Republic affirmatively accepted, consented to be bound by, or waived its right to object to, any Oklahoma statutes in presumptive effect at the time Republic qualified to do business in the state (R. 462, lines 32-35; R. 219-220). The "con-

sent" upon which the Oklahoma Supreme Court relied was not an actual waiver, express or implied in fact, but one constructed by implication of law from the mere fact of Republic's entry into the state:

> "Having entered this state and obtained the privilege of conducting its business operations therein when said laws were in full force and effect, it consented to be bound by such laws, and may not now complain that an order entered by the Commission within the scope of such laws is unconstitutional" (R. 462, lines 32-27).

But it is well settled that a foreign corporation, by accepting the privilege of doing business in a state, does *not* thereby waive the right or become estopped to attack existing statutes as unconstitutional.[13]

Thus, it is said in *W. W. Cargill Co. v. Minnesota* ex rel. *Railroad & W. Comm.*, 180 U. S. 452, 468, 45 L. ed. 619 (1900):

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13. *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629, 80 L. ed. 943 (1936); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 72 L. ed. 927 (1928); *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 71 L. ed. 1165 (1927) — see Case Note, 41 Harv. L. Rev. 95; *Frost v. Railroad Comm.*, 271 U. S. 583, 70 L. ed. 1101 (1926); *Fidelity & D. Co. v. Tafoya*, 270 U. S. 426, 70 L. ed. 664 (1926); *Terral v. Burke Construction Co.*, 257 U. S. 529, 66 L. ed. 352 (1922); *Union Pacific R. Co. v. Public Service Commission*, 248 U. S. 67, 63 L. ed. 131 (1918); *Canadian Pac. Ry. Co. v. Sullivan*, 126 F. (2d) 433 (C. C. A. 1, 1942), *cert. den.* 316 U. S. 696, 86 L. ed. 1766; *Northwestern Nat. Ins. Co. of Milwaukee, Wis. v. Lee*, 49 F. (2d) 274 (D. Oregon, 3 Judge Court, 1931); see *Hanover Fire Ins. Co. v. Carr*, 272 U. S. 494, 71 L. ed. 372 (1926) and Case Note in 40 Harv. L. Rev. 777; *W. W. Cargill Co. v. Minnesota ex rel. Railroad & W. Comm.*, 180 U. S. 452, 45 L. ed. 619 (1900); *Springfield Fire & Marine Ins. Co. v. Holmes*, 32 F. Supp. 964 (D. Mont., 3 Judge Court, 1940), *rev. on other grounds*, 311 U. S. 606, 85 L. ed. 384, *reh. den.* 311 U. S. 726, 85 L. ed. 473; *cf. Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 80-81, 81 L. ed. 510 (1937); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U. S. 544, 67 L. ed. 1112 (1923), and *Spaulding v. Douglas Aircraft Co.*, 154 F. (2d) 419 (C. C. A. 9, 1946).

> "The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or comply with any provisions of the statute or with any regulations prescribed by the state railroad and warehouse commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state, and the valid rules and regulations prescribed by the commission."

Mr. Justice Van Devanter wrote for this Court in *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 497-498, 71 L. ed. 1165 (1928):

> "The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a state does not thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States."

To the same effect is *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 400-401, 72 L. ed. 927 (1928):

> "It is established that a corporation, by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States."

And see the summation of authorities in *Northwestern Nat. Ins. Co. v. Milwaukee, Wis. v. Lee*, 49 F. (2d) 274, 279 (D. Oregon, 3 Judge Court, 1931):

> " . . . the courts with practical unanimity, hold that a foreign corporation, once having been permitted to enter a state and engage in business, has a right to invoke the Fourteenth Amendment against unjust discriminations whether they arise under legislation passed after its permit or before. We think this is settled by the decision in *Liggett v. Baldridge*, 278 U. S. 389, 48 S. Ct. 553, 72 L. ed. 927, as to legislation enacted before the foreign corporation was permitted to do business in the state."

The only two decisions assertedly to the contrary upon which appellees rely — *Pierce Oil Corp. v. Phoenix Refining Co., supra*, 259 U. S. 125, and *The Pipe Line Cases, supra*; 234 U. S. 548 — are plainly distinguishable.

In *Pierce Oil Corp. v. Phoenix Refining Co., supra*, 259 U. S. 125, decided prior to crystallization of the principle announced in the cases immediately hereinbefore cited, the foreign corporation not only acquired the privilege of doing business in Oklahoma, *but also filed with the Oklahoma Corporation Commission an affirmative acceptance of the provisions of the statute it later sought to attack* (259 U. S. at 127). It applied for and obtained an order temporarily exempting it from the provisions of the act, thereby acknowledging appreciation of the fact that its operations were within the statute's ambit (259 U. S. at 129). It exercised the privilege of eminent domain which the assailed statute accorded (190 Pac. at 859). It was admittedly engaged in transporting oil of other persons for hire, and was a common carrier in fact (190 Pac. at 858; 259 U. S. at 126) — see, as to this feature, *In re Champlin Refining Co.*, 129 Okla. 166, 264 Pac. 160, 161 (1928):

> ". . . *Pierce Oil Corporation v. Phoenix Ref. Co.*, 79 Okla. 36, 190 Pac. 857, affirmed in 259 U. S. 125, 42 S. Ct. 440, 66 L. ed. 855. That case involved the question of regulation of the Pierce Oil Corporation by the State Corporation Commission as a common carrier by virtue of having operated its pipe lines for the transportation of crude oil for hire . . ."

The Commission's order in the *Pierce* case was "*plainly* within the scope of the statute in effect when it entered the state" (259 U. S. at 128; our italics). Finally, this Court there placed considerable reliance upon:

> ". . . the large discretion which the state had to impose terms upon this foreign corporation as a condition of permitting it to engage in *wholly intrastate business* . . ." (259 U. S. at 128; our italics)[14]

Since Pierce Oil Corporation was there transporting for hire oil owned by other persons, and not hauling merely oil from its own wells, its constitutional objections must be viewed in a different light than those of present appellant.[15] And, in any case, the affirmative acceptance of the statute in the *Pierce* case deprives that decision of current relevancy. In this connection, see *Spaulding v. Douglas Aircraft*, 154 F. (2d) 419, 422 (C. C. A. 9, 1946):

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14. Contrast the case at bar where most of Republic's Oklahoma gas production was gathered and carried across the state line to Kansas where it was sold, under contract, to Northern Natural Gas Company (R. 168; R. 456, lines 3-8, and R. 457; lines 24-28). Under the instant facts Oklahoma's "discretion" was extremely limited: *West v. Kan. Natural Gas Co.*, 221 U. S. 229, 55 L. ed. 716 (1911), and *Haskell v. Kan. Natural Gas Co.*, 224 U. S. 218, 56 L. ed. 739 (1912).

15. Compare *Valvoline Oil Company v. United States*, 308 U. S. 141, 146, 81 L. ed. 151 (1939), *supra*.

"Here was no such an agreement to waive a claim of unconstitutionality as in *Pierce Oil Co. v. Phoenix Refining Co.*, 259 U. S. 125, 127, 42 S. Ct. 440, 66 L. ed. 855 . . .

"The situation is entirely different from those in the estoppel cases relied upon by appellees. In each of these the party contending the unconstitutionality of the statutes involved had acted *affirmatively* to procure a benefit from such statutes." (Court's own emphasis)

As for the famous *Pipe Line Cases, supra,* 234 U. S. 548, appellees here are relying upon a single sentence in the opinion of Mr. Justice Holmes which was formulated during discussion of the rights of only five of the six appealing pipe line companies, those being the five which were in fact, although not in form, common carriers, and to whom, *without resort to estoppel,* it was held the statute had constitutional application:

"The control of Congress over commerce among the states . . . may require those who are common carriers in substance to become so in form. So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid. [This is the sentence stressed by appellees in the case at bar.] So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we have already intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipe lines . . . There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view." (234 U. S. at 561)

But in discussing the rights of The Uncle Sam Oil Company, the only *private* carrier involved in *The Pipe Line Cases,* Mr. Justice Holmes does not so much as intimate that future *private* carriers may raise no objection to a statute which seeks to impose upon them the obligations of common carriage. The statute there under consideration merely compelled carriers common in substance to become so in form, and it was held constitutionally applicable even to common carriers whose operations antedated the Congressional enactment. Since neither a subsequent pipe line, nor an unconstitutional statute, nor, in any event, a *private* carrier was before the Court in the five appeals wherein the above-quoted language was spoken, that language cannot support the present Oklahoma Supreme Court judgment. Even were the quoted statement to be construed as expressing an opinion pertaining to the right of a subsequent *private* carrier to assail a statute unconstitutional as applied to it, such opinion would be sheer *dictum.* Moreover, Congressional jurisdiction over corporations desiring to engage in interstate commerce may not be likened to state rights touching admission of foreign corporations — especially those which enter the state to engage, for the most part, in interstate business.

At all events, the authorities hereinbefore cited, all decided subsequent to the *Pierce* and *Pipe Line* cases, clearly refute the principle upon which the Oklahoma Supreme Court sought alternatively to place its judgment.

(b). A State May Not Impose Upon a Foreign Corporation, as a Condition of Admission, a Waiver of the Corporation's Right to Assail Unconstitutional Statutes.

In their typewritten motion to dismiss, appellees cited one decision, *Washington* ex rel. *Bond & T., Inc. v. Superior Court*, 289 U. S. 361, 77 L. ed. 1256 (1933), for the proposition that a state may constitutionally impose upon a foreign corporation seeking admission thereto a requirement that the corporation accede to the provisions of existent statutes.

Again, however, appellees fail to appreciate the determinative feature of the case at bar. True, a state may require entering corporations to accept *valid* existing enactments; and acceptance by the corporation of such a condition precludes its right thereafter to contest such statutes. But if the statutes are *unconstitutional*, then a state may *not* exact from a foreign corporation a surrender of its right to resist them, and acceptance of the privilege of doing business does not estop the corporation from asserting its constitutional rights even though it accedes to the state's wrongful demands and consents to be bound by the unlawful enactments.

The very authority cited by appellees itself recognizes this rule:

> "It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the *reasonable* conditions imposed. (Citations) It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights, as was attempted in the cases upon which the appellant relies. (Citations) And for this reason a State may not exact arbitrary and

unreasonable terms respecting suits against foreign corporations as the price of admission. (Citation) But the statute here challenged has no such operation."[16]

If, as this appellant contends and this Court is asked to determine, the statutes and the order attacked in the case at bar are unconstitutional as applied to Republic, then it is undeniable that Oklahoma was without authority to require Republic to submit thereto, and that, even had Republic expressly consented to such a condition in consideration of its admission to do business in Oklahoma, nevertheless its right, now, to resist the statutes and order must remain inviolate.[17]

Mr. Chief Justice Taft stated the applicable principle thus, in *Terral v. Burke Construction Co., supra,* 257 U. S. at 532:

"The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right

16. *Washington* ex rel. *Bond & G. & T., Inc. v. Superior Court, supra,* 289 U. S. at 364-365; emphasis supplied.

17. *Phillips Petroleum Co. v. Jenkins, supra,* 297 U. S. 629, 80 L. ed. 943; *Quaker City Cab Co. v. Pennsylvania, supra,* 277 U. S. 389, 72 L. ed. 927; *Power Mfg. Co. v. Saunders, supra,* 274 U. S. 490, 71 L. ed. 1165, and Case Note in 41 Harv. L. Rev. 95; *Hanover Fire Ins. Co. v. Carr, supra,* 272 U. S. 494, 71 L. ed. 372, and Case Note in 40 Harv. L. Rev. 777; *Frost v. Railroad Comm., supra,* 271 U. S. 583, 70 L. ed. 1101; *Fidelity & D. Co. v. Tafoya, supra,* 270 U. S. 426, 70 L. ed. 664; *Kentucky Finance Corp. v. Paramount Auto Exch. Corp., supra,* 262 U. S. 544; 67 L. ed. 1112; *Terral v. Burke Construction Co., supra,* 257 U. S. 529, 66 L. ed. 352; *Union Pacific R. Co. v. Public Service Comm., supra,* 248 U. S. 67, 63 L. ed. 131; *Canadian Pac. Ry. Co. v. Sullivan, supra,* 126 F. (2d) 433; *Northwestern Nat. Ins. Co. of Milwaukee, Wis. v. Lee, supra,* 49 F. (2d) 274; and *Springfield Fire & Marine Ins. Co. v. Holmes, supra,* 32 F. Supp. 964.

to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, *whether waived in advance or not.*" (Our italics)

To the same effect is *Hanover Fire Ins. Co. v. Carr, supra,* 272 U. S. at 507:[18]

"The general principle . . . that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that a state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed."

Accord also is *Frost v. Railroad Comm., supra,* 272 U. S. at 596 and 598:

"For, conceding the right of a state to exclude foreign corporations, we must not overlook the limitation upon that right, now equally well settled in the jurisprudence of this court, that the right to do business cannot be made to depend upon the surrender of a right created and guaranteed by the Federal Constitution."

"And the principle, that a state is without power to impose an unconstitutional requirement as a con-

18. The proposition for which appellees and the Oklahoma Supreme Court in the case at bar cite *Pierce Oil Corp. v. Phoenix Refining Co., supra,* 259 U. S. 125, is expressly repudiated in the *Hanover* decision — 272 U. S. at page 516.

dition for granting a privilege, is broader than the applications thus far made of it."

See, too, *Quaker City Cab Co. v. Pennsylvania, supra,* 277 U. S. at 400-401:

> "It is established that a corporation by seeking and obtaining permission to do business in a state does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the state to require such a corporation to surrender the protection of the Federal Constitution."

A fortiori, here, where Republic's business undertakings are largely interstate, the State of Oklahoma could not lawfully exact from Republic any waiver of its fundamental right to attack unconstitutional Oklahoma statutes, and even had Republic expressly consented to be bound thereby its very assent would have been vitiated with illegality.

(c). In Any Event, the Instant Commission Order Should be Considered as Subsequent Legislation to Which the Doctrines of Waiver and Estoppel are Inapplicable.

Both appellees and the Oklahoma Supreme Court apparently concede the rule of estoppel upon which they alternatively rely does not, as assuredly it could not, apply with respect to a statute enacted after Republic had qualified to do business in Oklahoma. Manifestly a corporation may resist subjection to subsequent unconstitutional enactments, including amendments to prior

legislation.[19] This right likewise embraces the subsequent *application* of statutes to a foreign corporation, resulting from new administrative or judicial interpretation, even though the statutes themselves were in existence at the time the corporation acquired its right to do business in the state.[20] In this connection, it appears to be settled law that the mere application of a statute to a particular person under a particular state of facts may present a federal constitutional issue, without regard to whether the statute might be upheld as applied to a different person or under a different set of facts.[21]

Prior to the instant Commission order, the subject statutes had never been interpreted or applied to facts remotely analogous to those of the case at bar, either by the Oklahoma Supreme Court or by the Oklahoma Corporation Commission. In fact, the specific statutes of 1913 and 1915 upon which the Commission order purports to rest had never, prior to the present proceedings, been construed or applied to *any* factual situation whatever. And undeniably the instant order inaugurated the attempted application to Republic of the controversial Oklahoma enactments:

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19. *Bacardi Corp. v. Domenech*, 311 U. S. 150, 85 L. ed. 98 (1940); *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. ed. 673 (1938); *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 73 L. ed. 147 (1928); *Hanover Fire Ins. Co. v. Carr, supra*, 272 U. S. 494, 71 L. ed. 372; *Springfield Fire & Marine Ins. Co. v. Holmes, supra*, 32 F. Supp. 964.

20. *Connecticut Gen. Life Ins. Co. v. Johnson, supra*, ft'n. 19, 303 U. S. 77; *Hanover Fire Ins. Co. v. Carr, supra*, ft'n. 19, 272 U. S. 494; *cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. ed. 1107 (1930).

21. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. ed. 239 (1921); *Fidelity & D. Co. v. Tafoya, supra*, 270 U. S. 426, 70 L. ed. 664; *Fiske v. Kansas*, 274 U. S. 380, 71 L. ed. 1108 (1927).

"In the previous orders of the Commission . . . neither expressly nor by inference was any requirement made upon Republic to take gas from any wells except its own" (R. 455).

Therefore, we submit that order is open to attack by Republic under the rule of *Connecticut Gen. Life Ins. Co. v. Johnson, supra,* 303 U. S. 77, 82 L. ed. 673.

In addition, the Commission's order is itself legislative in character, and a "statute" within the meaning of the Fourteenth Amendment to the Federal Constitution.[22] By the same token, that order constitutes a "subsequent statute" which Republic is free to assail without impediment from the doctrine of estoppel.

In this connection, it should perhaps be pointed out that although the Commission's order was legislative in its inception, having thereafter been subjected to judicial review by the Oklahoma Supreme Court it became, thereby, transformed into a "suit" within the requirements of Section 237 (a) of the Judicial Code.[23]

Nor, we hasten to forfend, is there any question but that the Oklahoma Supreme Court's review herein was judicial. This Court's decision in *Southwestern Bell Teleph. Co. v. Oklahoma,* 303 U. S. 206, 82 L. ed. 751 (1938), germinated from sections 20 through 23, and,

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22. *Sultan Ry. & T. Co. v. Department of Labor and Ind.*, 277 U. S. 135, 72 L. ed. 820 (1928); *King Mfg. Co. v. Augusta*, 277 U. S. 100, 72 L. ed. 801 (1928); *Hamilton v. U. of California*, 293 U. S. 245, 79 L. ed. 343 (1934); *reh. den.* 293 U. S. 633, 79 L. ed. 717; *Live Oak Water Users' Asso. v. Railroad Comm.*, 269 U. S. 254, 70 L. ed. 305 (1926); *Northern Pac. R. Co. v. Department of Public Works*, 268 U. S. 39, 69 L. ed. 836 (1925); *Bluefield Water Works & Improv. Co. v. Public Service Comm.*, 262 U. S. 679, 67 L. ed. 1176 (1923); *Lake Erie & W. R. Co. v. State P. U. Comm. ex rel. Cameron*, 249 U. S. 422, 63 L. ed. 484 (1919).

23. *Old Colony Trust Co. v. Comm'r.*, 279 U. S. 716, 73 L. ed. 918 (1932).

especially section 23, of Article IX of the Oklahoma Constitution.[24] The principle there applied has since been strictly confined to rate and traffic classification orders governing transmission companies.[25] Furthermore, following this Court's decision in the *Bell Telephone Company* case, the Oklahoma Legislature, pursuant to unique authority conferred upon it by the Oklahoma Constitution,[26] amended the aforesaid provisions of the state constitution in 1941 so that today, in all instances, the Oklahoma Supreme Court's review of any Corporation Commission order is judicial.[27]

At page seven of their typewritten motion to dismiss this appeal, appellees asserted that "on numerous occasions" both the Oklahoma Supreme Court and Corporation Commission had made:

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24. These constitutional sections governed only appeals from orders concerning, "rates, charges, or the classification of traffic of any transportation or transmission company" (Okla. Const. Ann., Art. IX, §23).

25. See *Oklahoma Packing Co. v. Oklahoma G. & E. Co.*, 309 U. S. 2, 84 L. ed. 536 (1940); *Oklahoma Cotton Ginners' Ass'n. v. State*, 174 Okla. 243, 51 P. (2d) 327 (1935); *Cary v. Corporation Comm. of Okla.*, 17 F. Supp. 772 (W. D. Okla., 1936).

26. " . . . the Legislature may, by law, from time to time, alter, amend, revise, or repeal sections from eighteen to thirty-four inclusive, of this article, or any of them, or any amendments thereof." (Okla. Const. Ann., Art. IX, §35.

27. L. 1941, §6, p. 547, 28 April 1941 (Okla. Const. Ann., Pocket Supp., Art. IX, §23) repealed former §23; and former sections 20, 21, and 22 were amended, respectively, by L. 1941, §1, p. 544, §2, p. 545, and §3, p. 545 (Okla. Const. Ann., Pocket Supp., Art. IX, §§20, 21, and 22). The presently controlling statute (L. 1941, §1, p. 544, Okla. Const. Ann., Pocket Supp., Art. IX, §20) now provides:

"The Supreme Court's review of appealable orders of the Corporation Commission *shall be judicial only*, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts." (Our emphasis)

". . . identical applications of the statutes involved prior to the time that appellant qualified to do business in the State of Oklahoma."

But the record herein flatly contradicts that statement. In the instant order the Commission itself confesses:

"This statute [Laws 1913, Chapter 198] has never been directly interpreted by any court . . ." (R. 414, lines 17-18)

And the Oklahoma Supreme Court makes an identical concession:

"So far as we have been able to find this court has never been called upon to construe and apply the provisions of these sections." (R. 459, lines 28-30)

Moreover, the Oklahoma Supreme Court was in error when it said:

"However, we have had occasion to consider *similar* situations under other conditions, and other statutes." (R. 459, lines 30-33; our emphasis)

The "other decisions" construing "other statutes" under "other conditions", of which appellees and the Oklahoma Supreme Court irrelevantly contend Republic had knowledge at the time it qualified to do business in Oklahoma, cannot gainsay the fact that the *instant statutes* were never construed or applied prior to inception of the proceedings at bar. Nor, we submit, are the mentioned decisions even distantly relevant here.

Thus, *Oklahoma Natural Gas Corporation v. State*, 161 Okla. 104, 17 P. (2d) 488 (1932), appellees' chief

reliance,[28] upheld an order, issued pursuant to a 1921 Oklahoma statute, directing two *common purchasers in fact* and in law to take gas ratably. No objection was voiced that the order compelled a *private* gatherer of his own gas to purchase from others gas he did not want, and the opinion contains no intimation that the 1921 act, or any other enactment then extant, could apply to *private* producers or gatherers of gas.

Oklahoma Natural Gas Co. v. Corporation Commission, 90 Okla. 84, 216 Pac. 917 (1923), involved a domestic corporation which was a *public utility*, operating its own distribution system and also making city-gate sales of gas to other distribution companies for resale to ultimate public consumers. The case was:

> "... an appeal from an order of the Corporation Commission prescribing rates to be charged by the Oklahoma Natural Gas Company for gas furnished by it to various distributing companies and municipalities in the state." (216 Pac. at 917)

The sole issue determined is thus accurately condensed by the court's own opinion:

> "The question presented by this appeal is whether the rates prescribed by the Corporation Commission are reasonable and just. The company contends that such rates, both city gate and distribution, are unreasonable and unjust, and do not and will not render it a reasonable return upon the value of its property used and useful in rendering the service required of it." (216 Pac. at 919)

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28. Appellees' typewritten motion to dismiss, p. 7 (as corrected by typewritten amendment), describes this case as involving "an order identical in principle" to the instant one.

H. F. Wilcox Oil and Gas Company v. State, 162 Okla. 89, 19 P. (2d) 347 (1933),[29] *C. J. Julian Oil & Royalties Co. v. Capshaw*, 145 Okla. 237, 292 Pac. 841 (1930),[30] and *Quinton Relief Oil & Gas Co. v. Corporation Commission*, 101 Okla. 164, 224 Pac. 156 (1924),[31] the other three Oklahoma decisions relied on by appellees as having invested Republic with inceptive comprehension of the applicability to private gathering lines of the 1913 and 1915 statutes, albeit none involved or discussed either of such enactments, are likewise completely tangential to any issue here involved.

At page seven of their typewritten motion to dismiss this appeal, appellees stated:

> "The order of the Corporation Commission of the State of Oklahoma involved herein reflects that it had on numerous occasions made identical applica-

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29. Upon that appeal from an order shutting in a well, counsel for the appellee-Commission confessed there was, "no evidence in this record supporting the order appealed from" (19 P. 2d at 349). Reversal therefore being inevitable, the Oklahoma Supreme Court severely criticized the Commission for having deprived the appellant, "of its legal rights . . . not only in this instance, but in a prior instance wherein the attorneys for the appellees admitted in this court that the orders requiring the shutting in of the wells of this appellant were ineffective and void" (19 P. 2d at 350). The court then delivered a gratuitous lecture, "for the guidance of the corporation commission in future hearings" (19 P. 2d at 349), containing narry one word touching upon any issue entailed by the case at bar. It is this anomolous decision which is incorrectly cited in the instant Commission opinion (R. 412) as 119 P. (2d) 347.

30. This opinion, twenty-five pages of amorphous generalizations, simply upheld a basic proration order, of the type prevailing in petroleum states, which restricted each well to a production in the proportion that its potential bore to the total pool potential. No other problem was even considered.

31. This case merely upheld the state's authority to prohibit wasteful utilization of gas for carbon black manufacture, citing *Walls v. Midland Carbon Co.*, 245 U. S. 300, 65 L. ed. 276 (1920) as determinative of the entire appeal.

tions of the statutes involved prior to the time appellant qualified to do business in the State of Oklahoma."

Per contra, it is patent from even a cursory reading of the instant Commission order that the case at bar was for it one of troublesome first impression. Nor have we yet been favored by appellees with the citation of so many as a single Commission order applying any Oklahoma statute, much less the 1913 or 1915 statutes here involved, to a private gatherer of its own gas from its own wells. Had any such order ever been promulgated it is unthinkable that, as both the Commission and the Oklahoma Supreme Court concede, the statutes would never have become subject to appellate judicial consideration.

In this same connection; we take note of appellees' declaration, at page 7 of their typewritten motion to dismiss, that:

> "... appellant knew of the interpretation placed upon the statutes involved by the Corporation Commission of the State of Oklahoma when it qualified to do business in the State of Oklahoma (R. 270)."

The same affirmation appears in the Commission's instant opinion (R. 416):

> "Not only did Republic Natural Gas Company have knowledge of the laws, rules, and regulations, and decisions of the Supreme Court of Oklahoma concerning ratable taking, but the company was specifically told by the Honorable Wm. J. Armstrong, then Conservation Officer and now a member of the Commission, that if it entered the State of Oklahoma to drill gas wells, it would be required to produce and take gas from its wells ratably with the other wells in the common source of supply."

The only evidence upon which that recital could hope to rest is as follows (R. 208):

> "Q. I will ask you [Alfred Hurlburt, officer of and witness for Republic] if Commissioner Armstrong didn't ask you this further question [at a prior Commission hearing], and if you didn't make this answer:
>
> "'Q. It has always been the understanding between your company and the representatives of the Corporation Commission as you moved into Oklahoma, *that there was a ratable taking law in this State?*
>
> "'A. Yes.'
>
> "A. Yes, sir."

Aside from other obvious discrepancies between that testimony and the Commission's statement in its order, it requires no argument to demonstrate that knowledge of the existence of "a ratable taking law" is nowise tantamount to realization that such laws would one day be construed as applicable to gatherers of their own gas from their own wells. It is interesting, at this point, to observe that nowhere in its opinion does the Oklahoma Supreme Court agree with or rely upon the Commission's gratuitous assumption of Republic's peculiar, Armstrong-derived knowledge.

As a matter of fact, the only pertinent knowledge of Oklahoma statutory law which Republic possessed at the time it qualified to do business in that state was afforded by *Nowata County Gas Co. v. Henry Oil Co.*, 269 Fed. 742 (C. C. A. 8, Okla., 1920), which held Chapter 99 of the Oklahoma Session Laws of 1913 could not constitutionally invest the Oklahoma Corporation Commission with jurisdiction over sales by a private producer of gas from his own wells.

We submit the Commission's instant order, construing and applying the 1913 and 1915 Oklahoma statutes for the first time since their passage, should itself be treated as the legislative enactment of a "statute" long subsequent to Republic's entry into Oklahoma, and that, therefore, Republic may not be held to have "waived" its right to assert the unconstitutionality thereof.

We further submit that, under the authorities hereinbefore cited, even had Republic knowingly and affirmatively agreed to abide enforcement against it of the 1913-1915 statutes in consideration of the privilege of transacting Oklahoma business, nevertheless, since those statutes are repugnant to the Federal Constitution as here applied to Republic, such waiver would itself be void and unenforceable.

And in no event here, where Republic did not expressly consent to be bound by Oklahoma statutes or Commission orders, does the mere fact that Republic qualified to do business in Oklahoma when the controversial enactments were in existence estop Republic from asserting its constitutional rights upon this appeal.

F.

CONCLUSION

Republic is a private corporation. It entered the State of Oklahoma and there purchased mineral interests and gas leases. At its own cost it explored for gas, drilling wells upon acreage it owned or leased. It was a pioneer in the discovery and development of gas in the now famous Hugoton Gas Field (see R. 416, lines

21-25). In addition, at tremendous expense it constructed its own pipe line gathering system so it might gather, carry, and dispose of its own gas from its own wells. It sought and obtained a market for part of its production. At all time it has engaged in the strictly private business of producing its own gas wells, gathering the production therefrom in its own facilities, and carrying such gas to its own market. It has complied with all proration regulations of the Oklahoma Corporation Commission, and has not withdrawn from its wells more gas than permitted by the Commission's orders.

Peerless, on the other hand, has hazarded nothing. It drilled its controversial well at a time when the Hugoton Gas Field was a conclusively proven one, and at a place where commercial production was as certain to follow drilling as the night the day. It did so knowing it had neither a market for its gas nor facilities for carrying its gas to such markets as it might discover. And then, without attempting to obtain a market or construct carrying facilities of its own, it made its parasitic demand that its gas be transported and paid for by Republic.

Note Republic once offered to carry the Peerless gas free of charge and deliver it to whatever market Peerless might obtain (see R. 418, lines 35-36). But Peerless rejected this offer, demanding what it deemed its full pound of statutory flesh — Republic must not only transport, but must also *purchase* the Peerless gas and dispose of it upon Republic's own market which is insufficient even to enable Republic to sell all the gas from its own wells which the Commission has authorized it to produce. Not because the Peerless well is being

drained, not because it is being drained by Republic, nor even because Peerless has no pipe line facilities, but simply because Peerless has been unable or unwilling to find any one desirous of buying its gas, it insists Republic must assume the dual role of common carrier and common purchaser. It would seem the "correlative rights" which Peerless flaunts are themselves somewhat lacking in reciprocity.

We submit that Republic, a private producer, which merely gathers and carries its own gas from its own wells in its own gathering system to its own market, may not constitutionally be compelled to accept and carry to its private market in its private gathering line gas from the Peerless well. *A fortiori* we submit there can be no constitutional basis for requiring Republic to *purchase* gas from Peerless. The judgment of the Oklahoma Supreme Court should be reversed.

Respectfully submitted,

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G.

APPENDIX

Chapter 198, Laws of 1913 (52 Okla. Stats. Ann. §§231-235) enacts as follows:

"§231. *Ownership of gas.*[1] All natural gas under the surface of any land in this state is hereby declared to be and is the property of the owners, or gas lessees, of the surface under which gas is located in its original state." (Laws 1913, Ch. 198, p. 439, §1, 52 Okla. Stats. Ann. §231, p. 499)

"§232. *Drilling rights — Restrictions on output.* Any owner, or oil and gas lessee, of the surface, having the right to drill for gas shall have the right to sink a well to the natural gas underneath the same and to take gas therefrom until the gas under such surface is exhausted. In case other parties, having the right to drill into the common reservoir of gas, drill a well or wells into the same, then the amount of gas each owner may take therefrom shall be proportionate to the natural flow of his well or wells to the natural flow of the well or wells of such other owners of the same common source of supply of gas, such natural flow to be determined by any standard measurement at the beginning of each calendar month; provided, that not more than

1. Notwithstanding this statute, however, the "law of capture" still obtains in Oklahoma; oil and gas in place are not subject to absolute ownership until reduced to possession as personal property by drilling and production: *Rich v. Doneghey*, 71 Okla. 204, 177 Pac. 86, 89 (1918); *American Oil & Refining Co. v. Cornish*, 173 Okla. 470, 49 P. (2d) 81, 82 (1935); *Gruger v. Phillips Petroleum Co.*, 192 Okla. 259, 135 P. (2d) 485, 488 (1943); *Replogle v. Indian Territory Illuminating Oil Co.*, 193 Okla. 361, 143 P. (2d) 1002, 1007 (1943); *Ohio Oil Co. v. Sharp*, 135 F. (2d) 303, 307 (C. C. A. 10, 1943).

twenty-five per cent of the natural flow of any well shall be taken, unless for good cause shown, and upon notice and hearing, the Corporation Commission may, by proper order, permit the taking of a greater amount. The drilling of a gas well or wells by any owner or lessee of the surface shall be regarded as reducing to possession his share of such gas as is shown by his well." (Laws 1913, Ch. 198, p. 440, §2, 52 Okla. Stats. Ann. §232, p. 499)

"§233. *Sale of gas — Prices and amounts of gas to be taken — Delivery.* Any person, firm or corporation, taking gas from a gas field, except for purposes of developing a gas or oil field, and operating oil wells, and for the purpose of his own domestic use, shall take ratably from each owner of the gas in proportion to his interest in said gas, upon such terms as may be agreed upon between said owners and the party taking such, or in case they cannot agree at such a price and upon such terms as may be fixed by the Corporation Commission after notice and hearing; provided, that each owner shall be required to deliver his gas to a common point of delivery on or adjacent to the surface overlaying such gas." (Laws 1913, Ch. 198, p. 440, §3, 52 Okla. Stats. Ann. §233, p. 500)

The next section (Laws 1913, Ch. 198, p. 441, §4, 52 Okla. Stats. Ann. §234, p. 500) provides civil liabilities for violation of the act. The last section (Laws 1913, Ch. 198, p. 441, §5, 52 Okla. Stats. Ann. §235, p. 501) prescribes criminal penalties for such violation.

The production and transportation act of 1913 (Laws 1913, Ch. 99, 52 Okla. Stats. Ann. §§21-35), to which incidental reference is made in the Commission's opinion as "common purchaser statutes" and "common car-

rier statutes" (R. 411), is not stressed in the Commission opinion or relied upon by the Oklahoma Supreme Court as justifying the order here under attack. Therefore, we refrain from quoting its provisions.

Chapter 197, Laws of 1915 (52 Okla. Stats. Ann. §§236-247) contains twelve sections, only two of which were quoted by the Commission (§4, R. 410, 414; §8, R. 415). Inasmuch as the Oklahoma Supreme Court seemingly predicated its judgment entirely upon Chapter 198 of the Laws of 1913, placing no dependence upon Laws 1915, Chapter 197, we shall quote only sections four and eight and merely summarize the other sections of the 1915 act:

Section 1 (Laws 1915, Ch. 197, §1, 52 Okla. Stats. Ann. §236, p. 501) prohibits "waste" of natural gas.

Section two (Laws 1915, Ch. 197, §2, 52 Okla. Stats. Ann. §237, p. 502) defines "waste", and section three (Laws 1915, Ch. 197, §3, 52 Okla. Stats. Ann. §238, p. 503) provides gas encountered in wells shall be confined unless it can be "produced and utilized without waste".

> "§239. *Common source of supply — Excess gas supply — Apportionment and regulation to prevent waste.* Whenever the full production from any common source of supply of natural gas in this state is in excess of the market demands, then any person, firm or corporation, having the right to drill into and produce gas from any such common source of supply, may take therefrom only such proportion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person, firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage

drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. The said commission is authorized and directed to prescribe rules and regulations for the determination of the natural flow of any such well or wells, and to regulate the taking of natural gas from any or all such common sources of supply within the state, so as to prevent waste, protect the interests of the public, and of all those having a right to produce therefrom, and to prevent unreasonable discrimination in favor of any one such common source of supply as against another." (Laws 1915, Ch. 197, §4, 52 Okla. Stats. Ann. §239, p. 503)

Section five requires ratable and nondiscriminatory "taking" by every person, firm or corporation engaged in the business "of purchasing and selling natural gas" (Laws 1915, Ch. 197, §5, 52 Okla. Stats. Ann. §240, p. 505).

Section six is a procedural one (Laws 1915, Ch. 197, §6, 52 Okla. Stats. Ann. §241, p. 506); section seven provides for appeals to the Supreme Court from commission orders (Laws 1915, Ch. 197, §7, 52 Okla. Stats. Ann. §242, p. 506).

"§243. *Corporation Commission — Authority to make rules and regulations.* The Corporation Commission shall have authority to make regulations for the prevention of waste of natural gas, and for the protection of all natural gas, fresh water, and oil bearing strata encountered in any well drilled for oil or natural gas, and to make such other rules and regulations, and to employ or appoint such agents,

with the consent of the Governor, as may be necessary to enforce this act." (Laws 1915, Ch. 197, §8, 52 Okla. Stats. Ann. §243, p. 507)

Section nine (Laws 1915, Ch. 197, §9, 52 Okla. Stats. Ann. §244, p. 508) requires the filing with the Corporation Commission of an acceptance of the act by pipe line companies. Section ten (Laws 1915, Ch. 197, §10, 52 Okla. Stats. Ann. §245, p. 508) preserves the former duties of the Chief Mine Inspector. Section eleven (Laws 1915, Ch. 197, §11, 52 Okla. Stats. Ann. §246, p. 508) is a "partial invalidity shall not affect validity of the remainder" provision. And section twelve (Laws 1915, Ch. 197, §12, 52 Okla. Stats. Ann. §247, p. 508) enacts criminal penalties for violation of the act.